MAGELEINE INVESTMENTS PTE. LTD.

v.

SWISS LEVINGSTON (PROPERTY CONSULTANTS) PTE. LTD.

HIGH COURT, SINGAPORE
FA CHUA J
[CIVIL SUIT NO. 1337 OF 1989]
18 OCTOBER 1989

CIVIL PROCEDURE: *Injunction - Ex parte interim injunction to restrain presentation of winding up petition - Whether winding up petition was used to enforce payment of disputed debt - Whether abuse of process of the Court.*

The defendant claims to be entitled to a commission of $125,000 for recommending or introducing a purchaser ("Wintide") to the plaintiff. The plaintiff has denied the defendant's claim. The defendant, through its solicitors, issued a statutory notice on 4 July 1989 to wind up the plaintiff company. The plaintiffs' solicitors cautioned the defendant against taking out winding up action. On 7 July 1989, the defendant, repeated the threat to file a winding up petition, which it reasserted on 12 July 1989 (i.e. intention to proceed with presentation of winding up petition). The plaintiffs, in the present suit, seek an injunction to restrain the defendant from presenting a winding up petition until the dispute of its entitlement to commission is resolved by the Court. On 18 July 1989, the plaintiff obtained an *exparte* interim injunction in terms of its claim. The *inter partes* hearing of motion to continue the injunction came up before the learned Judge on 25 August 1989. The learned Judge examined the affidavit evidence filed on behalf of both parties.

(Dismissing the plaintiffs' motion for continuance of the exparte interim injunction obtained on 18 July 1989)

Held:

[1] It is settled law that a winding up petition is not to be used as a machinery to try a common law action.

[2] The presentation of a petition for winding up simply with a view to enforcing payment of a disputed debt is an abuse of the process of the Court. However, on the facts of this case, it appeared that the claim of the defendant is *bona fide* and the presentation of a winding up petition would not be an abuse of the process of the Court.

[Order accordingly.]

Case referred to:
In re Ban Hong Co. Ltd. [1959] MLJ 100

Legislation referred to:
Companies Act [Sing], s. 254(2)

For the plaintiff - Choo Kwun Kiat
For the defendant - V. Ramakrishnan

JUDGMENT

FA Chua J:

The plaintiff is an investment company buying properties for development or resale. In the course of its business transactions, the plaintiff has employed the services of commission agents to secure sales and purchases.

The plaintiff pleaded as follows:

Sometime in November 1988 the plaintiff bought a total of eight parcels of land at Upper East Coast Road from eight different owners ("the Properties"). Before any of the purchases was completed, the plaintiff was approached by one Robert Tan, a property broker, to sell the Properties to his "purchaser", Messrs Wintide Development Pte. Ltd. (Wintide").

Arising out of this introduction, a contract was signed between Wintide and the plaintiff for the purchase by Wintide of the Properties for a total sum of $9,231,630. The terms of the sale were that Wintide would complete the sale of each of the parcels with the respective owners "by way of a 3 party Conveyance/Transfer and the profits of $1,000,000 for the plaintiff would be payable by the said Wintide to the plaintiff on completion of the last of all the 8 parcels of land. Each of the completion was to be tied with the eviction of tenants/squatters of the respective land."

At the time of the filing of the writ, there are still two more completions to take place. The plaintiff has given Robert Tan advances amounting to $37,000 against commission to be paid to him.

The defendant claims to be entitled to a commission of $125,000 for recommending or introducing the purchaser Wintide. The plaintiff has denied the defendant's claim. The defendant, however, persists and has through its solicitors on 4 July 1989, issued a statutory notice to wind up the plaintiff. On 5 July 1989, the plaintiff through its solicitors cautioned the defendant against taking out the winding up action. On 7 July 1989, the defendant through its solicitors repeated the threat to file a petition to wind up the plaintiff. Despite further explanation from the plaintiff, the defendant through its solicitors again on 12 July 1989, asserted its right and intention to proceed with the presentation of the winding up petition.

The plaintiff now claims:

(i) an injunction restraining the defendant either by its servants or agents from presenting a winding up petition against the plaintiff until the dispute of its entitlement to commission is resolved by the Court; and

(ii) costs.

The plaintiff on 18 July 1989, on an *ex parte* application, obtained an interim injunction in terms of its claims until after the hearing of the motion returnable on Friday, 28 July 1989.

The motion to continue the injunction came before me on 25 August 1989, when after hearing the parties I dismissed the motion with costs.

The plaintiff has appealed against my decision. I now give my reasons.

The Affidavit Evidence

The defendant's version of the transactions is set out in the *affidavit of Robert Tan*. He is employed as a property broker by the defendant. As property broker of the defendant, he procured Wintide to buy the Properties from the plaintiff. The plaintiff, represented by Madam Pun Set Fah, a director of the plaintiff, agreed to pay a commission of 1% on the sale price. The agreement was reached at the registered office of the defendant on or about February 1989.

Wintide entered into separate contracts with the plaintiff to buy the Properties at $14.5 million and not $9,231,630 as pleaded by the plaintiff. A search was made at the Registry of Land Titles and Deeds regarding the Properties. Six of the eight parcels of the land have been

sold to the plaintiff who in turn sold them to Wintide. They were purchased and sold at same prices in respect of each transaction. The total sum of moneys that had already been paid by Wintide in respect of the six parcels of land amounted to $5,817,210. Two undivided third shares in Lot 3057 have not been registered with the Registry of Deeds. According to the plaintiff the Properties were sold to Wintide for $9,231,630 but from the documentary evidence registered with the Registry of Deeds the plaintiff had only received from Wintide the sum of $5,817,210 leaving a balance of $3,414,420 due from Wintide for the remaining two undivided third shares in Lot 3057, which seems odd when $582,210 had been paid for only one undivided third share in Lot 3057. He knew for certain that the Properties were sold for $14.5 million by the plaintiff to Wintide, and there was a difference of $5,268,370 unaccounted for by the plaintiff. The plaintiff's contention that it was making a profit of $1 million only was untrue.

There had been two previous dealings concluded by the defendant with Madam Pun on which the defendant had paid a commission of $19,733 to Asville Investment Pte. Ltd. which sum was received by Madam Pun. In another transaction Madam Pun had an option from Guan Soon Development (Pte) Ltd. through the defendant in which transaction Madam Pun made a substantial profit in the sub-sale.

Robert Tan had taken from Madam Pun two sums of money: $10,000 for and on behalf of the defendant and $27,000 as a personal loan.

On 1 March 1989, the defendant wrote to R C H Lim & Co. the solicitors acting for Wintide wherein it was stated that 1% commission of $145,000 had to be deducted from the sale proceeds and sent to the defendant based on $14.5 million sale and this was followed up with another letter dated 5 April 1989, and carbon copies of the second letter were sent to Madam Pun and to the plaintiff's solicitors M/s Choo & Yap. The amount claimed in the second letter was $125,000 as Madam Pun had requested and the defendant had agreed to a reduction of the commission from $145,000 to $125,000.

The letter of 1 March 1989, reads as follows:

> We acted as brokers in respect of the sale of the above mentioned property which was sold by us to M/s Wintide Development Pte. Ltd.
>
> You are the solicitor acting on behalf of the buyer. The vendor (Mdm Pun Set Fah or Nominees) has agreed to pay us our commission of 1% of the sale price upon completion as brokerage.
>
> As agreed by the buyer, we would be grateful if you deduct the 1% commission payable to us by the seller when paying out the proceeds to the vendor.
>
> Thanking you for your co-operation in the matter.

The letter of 5 April 1989, reads as follows:

> We are writing this letter to place on record the discussion on 4 April 1989 between the buyer of the above property (your client) and Madam Pun Set Fah (the vendor) at the buyer's office during which the seller had agreed to pay a lump sum amount of S$125,000 and that the amount is to be deducted from the purchase price and that we can write to you as the buyer's lawyer.
>
> Accordingly as agreed between the ..." ctd "... lawyer and the seller we shall thank you to kindly deduct the amount when the purchase is completed and pay us this amount which is the brokerage payable to us as brokers.
>
> We shall thank you for your co-operation in the matter.

The defendant did not receive any letter from the plaintiff or its solicitors denying that there was any commission due and payable to the defendant.

On 26 June 1989, the defendant's solicitors wrote to the plaintiff asking for payment of the $125,000 agreed commission within three days otherwise they had instructions to commence proceedings. On 30 June 1989, the plaintiff's solicitors' reply stated that "no commission is yet payable as the completion of the property as a whole has not taken place" and that "the commission if payable is not $125,000" as $37,000 had already been given by way of advancement.

On 4 July 1989, the defendant's solicitors gave in writing a statutory notice of demand under s. 254(2) of the Companies Act (Cap 50, 1985 Revised Ed.) to pay the $125,000 commission within 21 days failing which the defendant would be deemed to be unable to pay its debts, upon which ground the defendant would present a petition for a winding up order.

The defendant's solicitors then received a letter from the plaintiff's solicitors dated 4 July 1989, which stated:

> Further to our letter of 30 June 1989 we are now instructed that our clients never dealt with Swiss Levingston (Property Consultants) Pte. Ltd. Our clients, however, dealt with Mr Robert Tan.
>
> Please confirm the identity of your clients so that we can take proper instructions.

On 5 July 1989, the defendant's solicitors replied to the plaintiff's solicitors setting out the transactions between the plaintiff and the defendant and how the $125,000 commission was payable to the defendant. The defendant pointed out that the sale of all the lots, except for two undivided third shares in Lot 3057, had been completed and requested the plaintiff to pay $105,000 commission in respect to the lots which had already been sold and registered plus interest at 8% per annum from date of actual completion until payment and that the balance of $20,000 commission could be held back by the plaintiff until the actual completion of sale of the remaining two undivided third shares in Lot 3057. The defendant admitted that the sum of $10,000 had been given to the defendant, which could be deducted from the total commission due to the defendant. The defendant denied owing the plaintiff $27,000. The letter ended with the warning that in the event that the $105,000 was not paid within 21 days of the date of the notice dated 4 July 1989, the plaintiff would be deemed unable to pay the said commission and the defendant would proceed to wind up the plaintiff without giving the plaintiff any further notice. The defendant did not receive any payment.

On 8 July 1989, the defendant's solicitors received a letter from the plaintiff's solicitors dated 5 July 1989, disputing the defendant's claim.

Robert Tan in his affidavit set out a chronological account of the development of events culminating in the signing of the agreement for sale and purchase between the plaintiff and Wintide for the sale and purchase of the Properties:

(a) On 25 January 1989 Madam Pun came to the defendant company's office at 2.00 p.m. to get a buyer for the Properties.

(b) On 28 January Mdm Pun and I went to the office of .... "ctd ".. Choo & Yap, solicitors for the plaintiff company regarding the sale and purchase of the Properties.

(c) On 30 January 1989 Mdm Pun and I went to the office of R.C.H. Lim & Co. at 4.00 p.m. to discuss about the sale and purchase of the Properties.

(d) On 10 February 1989, Chan Chee Pew, solicitor from Chan Chee Pew & Co., Mdm Pun, Willy Tan of Wintide company came to the defendant company's office at 2.30 p.m. to discuss the sale of the Properties.

(e) On 23 February 1989, Willy Tan contacted me over the telephone requesting me to contact Mdm Pun for the delivery of the agreement for sale and purchase to R.C.H. Lim & Co.

(f) On 14 February 1989 Mdm Pun and Willy Tan came to the defendant company's office at 12.00 p.m. to discuss further about the Properties. ctd

(g) On 6 February 1989 Willy Tan telephoned me to ask Mdm Pun to sign the agreement for sale and purchase on that date.

(h) On 20 February 1989 Willy Tan telephoned me to request Mdm Pun to deliver the site plans by 2.00 p.m.

(i) On 21 January 1989 Mdm Pun requested her solicitors Choo & Yap to prepare separate agreements for signing by 4.00 p.m. at the office of R.C.H. Lim & Co.

A search was made at the Registry of Companies and Businesses pertaining to the plaintiff. It has been ascertained that the authourised capital of the plaintiff is $100,000 but the paid up capital is $2 and that the directors of the plaintiff are Madam Pun Set Fah and Dr Ho Nai Yin.

Madam Pun Set Fah in her affidavit in reply did not deny that she had been to the defendant's office for discussions but said that the discussions were in relation to different matters in which she was only interested as a broker.

She admitted receiving the $19,733 commission referred to by Robert Tan but said that transaction concerned only Robert Tan and her. The commission was collected by Robert Tan who later paid her half the commission by defendant's cheque and only then was she told that the defendant had helped to secure the purchaser.

She said that Robert Tan was only known to her as an individual property broker and that was the reason why she gave him an advance of $37,000 although the commission was not yet payable until the whole transaction had been completed.

She pointed out that Lots 20-1 and 21-6 Mukim 27 were sold to her personally and not to the plaintiff and she in turn sold it to Wintide at the original purchase price (Ex PSF1). She also pointed out that, apart from the two undivided third shares in Lot 3057, there was also another portion of Lot 3059 the sale of which to Wintide had not yet been completed.

The Properties were agreed to be sold to Wintide for $9,231,630 of which $5,817,210 had been paid by Wintide. With the amount of $1,000,000 profit payable by Wintide to the plaintiff the total amount of the transaction came to $10,231,630. It was on this basis and on a rounding up the figure that the commission payable at 1% was agreed at $100,000. However, the commission was to be shared by Robert Tan and Goh Mong Say, a property broker.

As regards the option from Guan Soon Development Pte. Ltd referred to by Robert Tan, the defendant was never involved in the transaction and it was Robert Tan who was involved and he had been duly paid his commission.

As regards the $27,000 which Robert Tan alleged was a loan made to him by the plaintiff, there was no reason why the plaintiff should lend him any money. The $27,000 was a further advance made to Robert Tan.

There was another transaction which Robert Tan had failed to mention in which he acted as broker in the purchase of a property in Geylang by Madam Pun and her partner Tan Eng Huat, on which Robert Tan received a commission of $10,000 in June 1989 and signed a receipt Ex PSF2.

Goh Mong Say, a property broker, in his affidavit said that he was the person who introduced Madam Pun Set Fah and Robert Tan to one another. He said that he was involved in the sale of the Properties. He "secured Madam Pun as the interim owner of the property in question whilst Robert Tan secured the purchaser, Messrs Wintide Development Pte. Ltd." He claimed to be entitled to half the commission payable on the transaction which was agreed between Robert Tan, Madam Pun and himself. He confirmed that the amount of commission payable upon completion of the whole transaction was agreed at $100,000. He said that he had not demanded payment of his half share due to the fact that he knew that the whole transaction had yet to be completed. He said:

> Due to handicap in language and sophistication (I am lowly educated having only finished primary school) further administration of the transaction with regards of attending to the plaintiff and purchaser when they go to solicitors were left to Robert Tan.

He concluded his affidavit by saying: "I would now wish to claim my half of the commission when the Court proceedings are started.

Balasubramanyam s/o Ramanadha, a businessman, in his affidavit, referring to Madam Pun Set Fah's allegation that Robert Tan received the commission in respect of the sale of the property in Geylang, said he was informed that the Geylang property was for sale. He then spoke to Robert Tan and Madam Pun. Later he found out that the property had been sold through Madam Pun who had approached Robert Tan to sign the receipt PSF2 for $10,000. PSF2 was an acknowledgement of receipt of $10,000 from Tan Eng Huat. This $10,000 commission was to be shared by him and the defendant. When he questioned Robert Tan about PSF2 the latter replied that he had signed it on behalf of the defendant but that the $10,000 was never paid.

Ivan Ho, a director of the defendant, stated that on 5 June 1989, Madam Pun Set Fah came to the defendant's office. He then accompanied Madam Pun and Robert Tan to a coffee shop at East Coast Road for lunch, when Madam Pun produced PSF2 and asked Robert Tan to sign it. In fact no money was handed over to Robert Tan when he signed PSF2. The said $10,000 was commission payable by the plaintiff for introducing the owner of the Geylang properties through the efforts of Balasubramanyam s/o Ramanadha who was entitled to a share of the said commission. This $10,000 was never received by the defendant nor was Balasubramanyam s/o Ramanadha paid directly.

The defendant had never agreed to share any commission with Goh Mong Say for introducing Wintide to purchase the Properties, or for that matter with anyone else. The original agreed commission was $145,000 based on the sale price of $14.5 million which was then reduced to $125,000. The defendant admitted having received $10,000 being part of the agreed commission.

Shamsiah bte Ramlee, a director of the defendant, in her affidavit said that on 25 January 1989, Madam Pun Set Fah came to the defendant's office at 2pm to discuss the sale of the Properties. On 10 February 1989, Chan Chee Pew, a solicitor from Messrs Chan Chee Pew & Co., Madam Pun and Willy Tan of Wintide came to the office at 2.30pm to discuss about the sale of the Properties with Robert Tan, an employee of the defendant. On 14 February 1989, at about 12.00 pm Willy Tan, Robert Tan and Madam Pun came to the office to discuss about the Properties.

Robert Tan was employed by the defendant as a property broker and any deal that he concluded was for the benefit of the defendant.

Madam Pun had been to the defendant's office on many occasions for the purpose either to buy or sell properties and sought the defendant's services through Robert Tan.

She knew for certain that the defendant was involved with Madam Pun in respect of two deals:

(a) the sale of properties at Telok Kurau in respect of which Madam Pun collected $19,733 being the half share commission payable to Ashville Investment Pte. Ltd. of which Madam Pun was a director;

(b) Madam Pun had obtained an Option from Guan Soon Development Pte. Ltd. through the defendant and she made substantial profits therefrom by way of sub-sale.

Madam Pun dealt with the defendant previously and she knew that Robert Tan was an employee of the defendant who concluded the sale of the Properties with Wintide and the commission was meant for the benefit of the defendant.

Robert Tan in his affidavit in reply to the affidavits filed by Madam Pun Set Fah and Goh Mong Say denied that he had an understanding with Goh Mong Say to share the commission. He was the one who introduced Wintide to Madam Pun and ultimately the sale was concluded. He alleged that Madam Pun had deliberately brought in Goh Mong Say to confuse the issue.

As regards the sale of Lots 20-1 and 21-6 Mukim 27, Robert Tan pointed that, looking at para. (A) of the recital of the agreements PSF1, it was clear, that although Madam Pun was the buyer, the whole properties were purchased for the benefit of the plaintiff.

As regards Lot 3059, the sale of part of which Madam Pun alleged had not been completed, the schedule to the Indenture of Conveyance dated 4 July 1989, clearly stated that the whole of Lot 3059 of Mukim 27 had been conveyed to Wintide for the sum of $335,000.

As regards the option from Guan Soon Development Pte. Ltd., which Madam Pun alleged that the defendant was not involved, Robert Tan said that the commission received in respect of that transaction was for the use and benefit of the defendant and on which the defendant commenced proceedings against Guan Soon Development Pte. Ltd. in December 1988 and eventually the commission of $40,950 was paid to the defendant.

As regards the sale of the properties in Geyland it was Balasubramanyam s/o Ramanadha who recommended to Madam Pun the said properties for sale but Madam Pun went behind his back and obtained a buyer for the said properties which were then mortgaged to Banque Nationale De Paris. Madam Pun brought along PSF2 and asked him to sign it knowing full well that the $10,000 commission was meant to be shared between the defendant and Balasubramanyam s/o Ramanadha. Robert Tan said that Madam Pun did not keep her promise and the $10,000 was never paid.

To sum up: The plaintiff's contention is that the transaction with Wintide has not yet been completed; the plaintiff does not dispute that commission is payable but commission is payable only after the completion of the transaction with Wintide; that when payable the commission is not payable to the defendant but to Robert Tan and Goh Mong Say. The plaintiff disputes the amount of commission payable.

The plaintiff's submission is this: If a petition for winding up is presented, the plaintiff would be handicapped and would suffer great damage; the plaintiff's credit would be injured; the plaintiff would not be able to continue to transact pending transactions where time is of the essence. As the defendant's claim is disputed the petition for winding up would be an abuse of the process of the Court. There are a number of triable issues and the *status quo* should be preserved so that the parties could have the claim of the defendant adjudicated.

It is clear that Robert Tan was at the material time employed by the defendant as a property broker. Madam Pun Set Fah admitted that she had been to the defendant's office to discuss about land transactions with Robert Tan. It is inconceivable, on the evidence, that Madam Pun was not aware that Robert Tan was employed by the defendant as a property broker and was acting on behalf of the defendant.

A copy of the defendant's letter dated 5 April 1989, to R.C.H. Lim & Co. the solicitors acting for Wintide, was sent to Madam Pun and M/s Choo & Yap the plaintiff's solicitors. The plaintiff and its solicitors did not deny that there was any commission due and payable to the defendant. With reference to this letter Madam Pun in her affidavit dismissed it as "frivolous" and said: "I do not feel that at that moment the need to reply."

In reply to the defendant's letter of 26 June 1989, demanding payment of the agreed commission of $125,000, the plaintiff did not deny that commission was due to the defendant but in its reply on 30 June 1989, the plaintiff stated that "no commission is yet payable as the completion of the property as a whole has not yet taken place" and that "the commission if payable is not $125,000 as stated" and asked the defendant to confirm that the advances totalling $37,000 had been paid to the defendant.

In their letter of 5 July 1989, to the defendant, the plaintiff's solicitors stated that the defendant's claim was disputed. It was only by letter of 10 July 1989, that the plaintiff's solicitors stated that the plaintiff denied liability.

Madam Pun admitted that commission was due to Robert Tan. Goh Mong Say admitted he never appeared in any of the negotiations. All he did was to introduce Madam Pun and Robert Tan to one another. To me it appears that the claim of Goh Mong Say to commission is baseless.

The evidence is that the sales of the Properties have been completed except for the undivided third shares in Lot 3057. A substantial sum of money had already been paid by Wintide to the plaintiff. It is inconceivable that in a transaction of this nature that the plaintiff would be making only a profit of $1 million.

It is well settled law that a winding up petition is not to be used as machinery to try a common law action and that the presentation of a petition for winding up simply with a view to enforcing payment of a disputed debt is an abuse of the process of the Court (see *In re Ban Hong Co. Ltd.* [1959] MLJ 100).

It appears to me that the claim of the defendant is *bona fide* and the presentation of a winding up petition would not be an abuse of the process of the Court.

Also found at [1990] 1 CLJ 385